

REMARKS

This Response is submitted in reply to the Final Office Action mailed on December 12, 2001. The Office Action rejects Claims 1-10 under 35 U.S.C. §103 in view of several references. Applicants respectfully submit, for the reasons set forth below, that the rejection is not proper and therefore should be withdrawn.

At the outset, Claims 1 and 10 have been amended to further clarify the claimed invention. Claim 9 has been amended to correct minor errors in the claim and has not been amended for purposes of patentability. No new matter has been added to any of the claims.

The claimed invention provides in Claims 1-9, a canned pet food and in Claim 10 a process for producing a canned pet food. More specifically, independent Claim 1 claims a base layer including solid pieces in gravy and an upper layer comprising a substantially solid food stuff capable of supporting the base layer when the pet food is inverted. The layers remain stratified in the can before serving.

Independent Claim 10 claims a process comprising filling a base layer of solid food pieces in a gravy into a can and then, filling an upper layer into the can, wherein each of the base layer and upper layer has a viscosity falling within a specific range and remain stratified before serving. In the claimed invention, the layers are structured and ordered so that when an open can is tipped to release the contents, the contents remain stratified. The solid layer is designed to emerge first and settles in the dish. The emergence of the solid layer is encouraged by the fluidity of the lower layer of chunks and the gravy behind it. The gravy and chunks then follow to form a layer on top of the solid layer, possibly spilling down its sides.

The solid layer is inherently more stable and reduces the risk of creating a mess upon opening the can because the solid layer is deposited from the can first and the solid pieces and gravy are then deposited on the solid layer. If the order were reversed, the solid layer would be deposited on the solid pieces and gravy, which could splatter some of the gravy and create a mess. This issue relates more to pet food products because human foods tend not to be served as a complete meal in a can.

Claims 1-10 stand rejected under 35 U.S.C. §103(a) as being unpatentable over *Ohba* ('252) in view of Applicants' alleged admission of the prior art, *Poppel et al.* ('504) and further in view of *Quaker Oats* (GB '351), *Hillebrand et al.* (Australia '797), *McMahon* (GB '351), *QP*

Corp (Jap '174), QP Corp ('677), Errass (Europe '046), Henkel (GB '234), and further in view of Waldburger ('254), McGonigle ('174), Cease ('537), Bliley ('086), Stover ('245) and Rogers, et al. ('094). Accordingly, the claims still stand rejected as being obvious in view of sixteen references. Applicants respectfully maintain that this rejection is not proper either as a matter of law or fact.

The Patent Office refers to *In re Gorman* and states that patentability is not based on the number of references cited, but instead, on whether the teachings of the prior art, taken as a whole, would have made the claimed invention obvious. 18 U.S.P.Q.2d 1885, 1888. Therefore, the Patent Office claims that the teachings of the prior art stated above, taken as a whole, renders the claimed invention obvious.

The Patent Office, however, cannot reconstruct the claimed invention, by using Applicants' claimed invention as a template or model to select and combine elements from the prior art to form the claimed invention. Instead, there must be some suggestion or motivation in the prior art to make the specific combination of the prior art elements. *See In re Gorman*, 18 U.S.P.Q.2d at 1888. In this case, the prior art references do not provide any motivation or suggestion to combine the elements as suggested by the Patent Office to form the claimed invention. This is demonstrated, in part, by the large number of references that must be combined to allegedly suggest the claimed invention. Where is the motivation to combine this large group of references in the specific manner of the claimed invention?

Applicants respectfully submit that the obviousness rejection of Claims 1-9 is improper. With respect to independent Claim 1, none of the cited references, either alone, or in combination, suggest a canned pet food having an upper layer which provides support to a gravy and food piece base layer upon inversion of the can. With respect to independent Claim 10, not one of the references suggests the claimed order of filling a can. Indeed, the references fail to disclose or suggest that the order of filling the can is important in order to obtain the desired structure on emptying out the contents of the can.

The principal reference relied upon in the Office Action is *Ohba*. *Ohba* fails to disclose or suggest the ability of the upper layer after inversion, to support the base layer. Nor does *Ohba* disclose or suggest that the base layer, before inversion, includes solid food pieces in a gravy whereby the food pieces are supported by the solid foodstuff after inversion of the can. *Ohba*

teaches that different food varieties having substantially homogeneous mixtures are included in the can. The variety of food in the can prevents a pet from becoming satiated, encourages the pet to eat all of its food, and prevents food waste. *Ohba*, however, does not disclose, or teach or suggest, placing specific types of food in a specific order in the can so that upon inversion of the can, a specific top layer of food is supported by a specific bottom layer of food. As illustrated by Figures 1 and 2 in *Ohba*, the order of the pet food layers in the can is not important. What *Ohba* teaches one skilled in the art is only that the order in which the food is eaten by the pet should be varied (see column 2, lines 16-22).

Moreover, *Ohba* also does not disclose or suggest using a chunk and gravy type pet food, but only homogeneous, consistent mixtures of food. A chunk and gravy style pet food would not enable the layers in *Ohba* to remain together. In Fig. 2, if a chunk and gravy type pet food is placed in the middle layer, the layers would be unstable and move apart. Also, if the pet chunk and gravy type food is placed on the top layer, a user either has to scoop the food out of the can using a suitable utensil or the layers will fall apart when placed on a plate or bowl. Therefore, *Ohba* teaches away from the claimed invention because it suggests that it is not desirable to have a chunk and gravy type food base layer as in the claimed invention. A chunk and gravy type food reduces the capacity to vary the order of layers and to maintain the order of the layers for pets. Thus, *Ohba* does not disclose nor suggest the base layer and upper layer as specifically claimed in independent Claim 1.

To remedy the deficiencies of *Ohba*, the Patent Office states that Applicants have admitted that it is known to have solid meatloaf products and chunk-type products. This appears, in part, to form the basis for the proposed modification of *Ohba*. However, as Applicants set forth in their patent application, such products are meatloaf products that encase the chunk product. The products do not include separate layers as in the claimed invention.

Moreover, the Patent Office still fails to address the importance of the gravy which accompanies the chunks. The gravy contains fat which provides nutrients, moisture and palatability, which is a feature not disclosed in Applicants' admissions or *Ohba*. Accordingly, the citation to this alleged admission of prior art does not remedy the deficiencies of *Ohba*. Modifying *Ohba* based on the alleged admission of prior art would not result in a multi-layer product having specifically textured layers which serve distinct functions. Indeed, modifying

Ohba based on the alleged admissions would still teach away from the claimed invention.

Moreover, *Poppel et al.* does not remedy the deficiencies of *Ohba*. *Poppel et al.* relates to formulated emulsion products in a loaf-like form, which are cut into chunks to form a meat-like product. The aim of the product is to make a meat-like product with relatively high moisture that is desirable to pets.

Particularly, the Patent Office states that *Poppel et al.* includes a gelled meat loaf product (Example 1) and a product that has solid food pieces in a gravy (Example 4) that allegedly “reads on” the claimed invention. The Patent Office further alleges that it is expected that a solid food loaf would support food pieces. The Patent Office is respectfully, incorrect.

Poppel et al. describes a solid loaf in Example 1. *See* Col. 6, lines 35-60. The solid loaf is formed by cooking a loaf product mixture and then filling the mixture with chunks (i.e. solid food pieces). *See* Col. 6, lines 53-54. Thus, the chunks are incorporated into the loaf, and not supported by the loaf, and then placed into cans. Example 1 does not teach or suggest forming upper and base product layers that remain stratified in a can and where the upper layer supports the base layer upon inversion of the can.

Example 4, as well as Examples 2, 3, and 5, in *Poppel et al.* refers to a chunk and gravy mixture that is filled into cans. *See* Col. 7, lines 37-62. The chunk and gravy mixture, however, is not formed into stratified layers in the can. Therefore, the chunk and gravy product in Example 4, either alone or in combination with Example 1 described above, does not teach or suggest a canned product having a stratified upper layer of solid foodstuff and a base layer of solid food pieces in gravy where the upper layer supports the base layer upon inversion of the can.

For the above reasons, *Poppel et al.* does not disclose, or teach or suggest, creating pet food with a solid food piece and gravy base layer and a solid foodstuff upper layer that remains stratified in a can and where the upper layer supports the base layer upon inversion of the can as in the claimed invention. Thus, even after the Patent Office combines the *Ohba* and *Poppel et al.* references, the references clearly fail to teach or suggest all of the elements of the claimed invention.

The remaining references do not remedy the deficiencies of the three principal references set forth above.

With respect to the *Quaker* reference, *Quaker* does not provide any layered structure at all. Although it teaches the manufacture of a two phase product, neither phase comprises individual solid chunks in a substantially flowable medium such as gravy. In *Quaker*, one of the phases is completely surrounded by the other phase. This is set forth as being an essential feature of *Quaker*. This, therefore would direct one skilled in the art away from the claimed invention.

The *McMahon* reference does not deal with pet foods. Although it contemplates meat-based products, it provides a product wherein each can provides several identical servings though they have a vertical separation of components. In contrast to the claimed invention, *McMahon* is not concerned with a single serving having a specifically desired structure. Instead, *McMahon* provides a two-phase food product wherein the phases are separated along a substantial axial interface in the can. Thus, *McMahon* is not concerned with issues that are created by a horizontally layered structure that is designed so that its contents are dispensed into a dish or other container.

In contrast to the claimed invention, wherein the product is designed to be inverted into a dish and maintain an attractive appearance, *McMahon* is satisfied with an attractive appearance only at the time the can is opened. See page 2, line 61 to page 3, line 5. Instead of inverting and dumping the can into a dish, in *McMahon* the concern is with spooning out the phases in a uniform manner. See page 2, lines 62-64. *McMahon* is not concerned with maintaining a vertically based configuration of stratified layers upon inverting the can. Thus, one of ordinary skill in the art would not be motivated to combine *McMahon* with the other references.

Similar to *McMahon*, *Hillebrand* is concerned with the appearance of the product in the container and not with the appearance of the contents when they are emptied from the container. *Hillebrand* is not concerned with a product that is dispensed into one complete meal. Therefore, *Hillebrand* is not concerned with the inversion of the can but, provides a product that is designed to be scooped out of the container in appropriate portions. Hence, *Hillebrand* is not concerned with the structure of the present invention that allows a container to be inverted and dispensed into a dish maintaining its structural integrity. A person of ordinary skill in the art would not be motivated to combine *Hillebrand* with the other references.

The *QP Corp* references also do not remedy the deficiencies set forth above. Each of the *QP Corp* references is concerned with bread-spread compositions in a container. By definition

the spreads would be removed in small, discrete quantities. Thus, the issues that are faced by the claimed invention in providing a complete meal that can be attractively dispensed in its entirety from a can are not a concern with these references. These references, however, are concerned with putting the food in an attractive position within the container. Therefore, one of ordinary skill in the art would not be motivated to combine the *QP Corp* references with the other prior art references to form the claimed invention.

Furthermore, with respect to *QP Corp* ('677), it should be noted that the viscosity of the components are 10-100 times greater than the viscosity of the components of the claimed invention. Thus, this product will not easily release from the can and must be withdrawn from the container by scooping small portions out with a suitable utensil. By contrast, the claimed invention can be dispensed from the container by a simple inversion of the can.

With respect to *Errass*, this reference relates to a product, specifically a condiment, that is dispensed from a tube. Nothing is disclosed in *Errass* with respect to stratified layering of food.

The *Henkel* reference relates to a cosmetic, not a food. Applicants respectfully submit that this reference would not even be considered by one skilled in the art. Regardless, the reference does not disclose horizontally stratified layers. Therefore, *Henkel* does not remedy the deficiencies noted above.

Waldburger discloses a container having a removable cover. Food is placed within the container in an inverted position and frozen. When the food is to be heated, the cover is removed and the container is inverted onto an ovenable plate. The plate and container are brought to a temperature suitable for eating. The container is then removed from the plate, leaving the food in a position suitable for serving. However, *Waldburger* does not teach or suggest a canned pet food product. In addition, *Waldburger* does not disclose chunks in a gravy layer. The reference only discloses a solid, non-stratified, single piece of steak and a gravy, unlike the claimed invention.

McGonigle discloses an apparatus which holds food to be heated in an oven. The apparatus consists of a compartmentalized lid which is inverted over a reusable dish and placed in an oven for heating. Foods placed in the lid are placed in an inverted manner. After the food is heated, the apparatus is inverted for serving.

However, nowhere in the specification does *McGonigle* teach a pet food upper layer

which is capable of supporting a pet food base layer when the pet food is inverted. *McGonigle*, in Col. 3, lines 52-54, mentions that sauces that are intended to cover an entrée are placed in the lid first. There is no mention, however, of the entrée being able to support the sauce when inverted. In fact, it would be expected that the sauce would inter-mix with the entrée in the lid. Moreover, *McGonigle* teaches the separation of meal components into separate compartments when preparing the meal. Again, this clearly teaches away from the stratified pet food layers of the claimed invention.

Cease discloses a holder which receives frozen foods in an inverted manner. The holder is inverted on a service plate. *Cease* does not mention a canned product. Nor does *Cease* mention filling a meal into a single compartment. *Cease* also does not include a gravy containing chunks. Thus, one of ordinary skill in the art would not be motivated to combine *Cease* with any of the other references to form the claimed invention.

Bliley discloses a method for preparing a frozen food package. A sauce is placed in a container and frozen. Another food, such as spaghetti, is placed in the same container and the container is again frozen. Upon serving, the container heated and inverted. While *Bliley* mentions a base layer and an upper layer, *Bliley* does not mention an upper layer that is specifically provides support to a base layer when inverted for serving. In fact, it would not be expected that the spaghetti and sauce would remain separate after heating the container. On the contrary, it would be expected that some of the sauce would inter-mix with the porous spaghetti strands before and after inversion. Therefore, one of ordinary skill in the art would not be motivated to combine *Bliley* with any of the other references to form the claimed invention.

Stover discloses an ice cream package. The present invention, in contrast, is a pet food. Applicants respectfully submit that this reference would not even be considered by one skilled in the art. Thus, one of ordinary skill in the art would not be motivated to combine *Stover* with any to the references to form the claimed invention.

Rogers teaches a food product having a gravy mixture including gelatin. The gravy mixture is placed in a container. A meat product is placed on top of the gravy mixture. *Rogers*, by the Patent Office's own admission, does not teach the inversion of a food product when serving the food product. *Rogers* teaches support of the meat by the gravy; however, *Rogers* does not teach the converse. *Rogers* also does not teach a canned food product directed to pets.

Moreover, *Rogers* only teaches a single meat product which may disintegrate into chunks.

Applicants note for the record that not only does the prior art, if combinable, not suggest the claimed invention but there is no motivation to combine the cited references with *Ohba* to arrive at Applicants' invention. Therefore, Applicants respectfully submit that the Patent Office has improperly engaged in hindsight reconstruction of the claimed invention.

In conclusion, with respect to independent Claim 1 and 10, as amended, and Claims 2-9 that depend from Claim 1, none of the cited references, either alone, or in combination, teach or suggest the elements of the claimed invention. Therefore, Applicants respectfully request that the rejection be withdrawn.

For the foregoing reasons Applicants respectfully request reconsideration of their patent application and earnestly solicit an early allowance of same.

Attached hereto is a marked-up version of the changes made to the specification and claims by the current amendment. The attached page is captioned "**Versions with Markings to Show Changes Made.**"

Respectfully submitted,

BELL, BOYD & LLOYD LLC

BY 

Robert M. Barrett

Reg. No. 30,142

P.O. Box 1135

Chicago, Illinois 60690-1135

Phone: (312) 807-4204

VERSION WITH MARKINGS TO SHOW CHANGES MADE

In the Specification:

The paragraph beginning at line 10 on page 7 has been amended as follows:

Alternatively ~~Alternative~~, the substantially solid foodstuff may be cooked rice or noodles, or both. In this case, the settable foodstuff may be freshly cooked rice or noodles. Upon cooling, the freshly cooked rice or noodles form a substantially solid layer. If desired, suitable gelling or thickening agents, for example gums such as kappa-carrageenan, locust bean gum, guar gum and xanthan gum may be added to the rice or noodles. Usually no more than about 2% by weight of gelling or thickening agent is needed.

The paragraph beginning at line 21 on page 7 has been amended as follows:

Alternatively ~~Alternative~~, the substantially sold foodstuff may be an aspic; for example an aspic which contains cooked vegetable pieces. The aspic may be prepared as is conventional. Additional ingredients such as sugars, salts, spices, seasoning, flavoring agents, minerals, and the like may also be added to aspic. The amount of additional ingredients used is preferably such that they make up about 0.25% to about 5% by weight of the aspic.

In the Claims:

Claim 1 has been amended as follows:

1. (Amended) A canned pet food product comprising:
a base layer comprising solid food pieces in a gravy, the gravy comprising about 20% to about 40% by weight of the base layer; and
an upper layer comprising a substantially solid foodstuff ~~capable of supporting the base layer when the pet food product is inverted, the substantially solid foodstuff comprising~~ which is about 20% to about 80% by weight of the pet food product, wherein the base layer and the upper layer remain stratified before serving and the upper layer supports the base layer upon inversion.

Claim 9 has been amended as follows:

9. (Amended) A product according to claim ~~1~~ 9 in which the upper layer has a viscosity in the range of about 2500 to about 4000 centipoise during filling ~~filling~~ of the upper layer into the can.

Claim 10 has been amended as follows:

10. (Amended) A process for producing a canned pet food product having at least two layers, the process comprising:

filling a base layer comprising solid food pieces in a gravy into a can, the gravy having a viscosity in the range of about 350 to about 1000 centipoise and forming about 20% to about 40% by weight of the base layer;

filling an upper layer into the can, the upper layer comprising a settable foodstuff having a viscosity in the range of about 2500 to about 4000 centipoise and, upon cooling, forming a substantially solid foodstuff, the settable foodstuff comprising about 20% to about 80% by weight of the upper and base layers wherein the base layer and the upper layer remain stratified in the can and the upper layer supports the base layer upon inversion;

sealing the can; and

retorting the sealed can.